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No. 99-296

IN THE

SUPREME COURT OF THE UNITED STATES

DEBRA WALKER, JEANETTE WASHINGTON, HAZEL WILLIAMS, ZELMA LANG, RENITA BROWN, LILLIE THOMPSON, TRACEY SMITH,

Petitioners,

v.

CITY OF MESQUITE, TX; DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; THE HOUSING AUTHORITY OF THE CITY OF DALLAS; HIGHLANDS OF McKAMY IV AND V COMMUNITY DEVELOPMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.; DAVID BEER; HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; and THE CITY OF DALLAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL F. KOLB
CHARLES T. LESTER, JR.
Co-Chairs
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON*

RICHARD T. SEYMOUR
CHERYL L. ZIEGLER
Lawyers' Committee for
Civil Rights Under Law
1401 New York Ave., N.W., Suite 400
Washington, DC 20005
(202) 662-8600

Attorneys for Amicus Curiae

October 18, 1999

*Counsel of Record

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Lawyers' Committee for Civil Rights Under Law moves for leave to file a brief as *amicus curiae*. Proposed *amicus* draws on its own experience and offers analyses of the subject matter of the petition that differ from those of Petitioners. Petitioners and the United States, as a Respondent, have consented to the filing of this brief. Consent has not been received from Highlands of McKamy IV and V Community Improvement Association, et al., who have filed a waiver of response to the petition, or from the Housing Authority of the City of Dallas or the City of Mesquite.

Respectfully submitted,

_____

Thomas J. Henderson

Dated: October 18, 1999

QUESTION PRESENTED FOR REVIEW

Amicus suggests that an alternative formulation of the question presented might be considered by the Court, as follows:

Whether the narrow tailoring inquiry as to a remedy order providing for the race-conscious selection of sites for public housing, fashioned to afford prompt and effective relief to the victims of unconstitutional racial segregation, requires that a court identify the particular unconstitutional conditions to be addressed by that remedy, assess the relative effectiveness of race-neutral site selection alternatives, and distinguish race-conscious from race-neutral remedies.

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a national civil rights organization, established in 1963 at the request of President Kennedy to involve private lawyers in a national effort to assure civil rights for all Americans. The Lawyers' Committee, enlisting the services of hundreds of private attorneys, has represented thousands of clients in litigation to remedy racial discrimination, including in federally assisted housing programs.

The Lawyers' Committee has substantial knowledge of and experience in cases involving the *de jure* segregation of public housing. It currently represents clients in three such cases, two of which implicate race-conscious site selection remedies, to develop public housing in white communities from which it has been excluded. The Lawyers' Committee also advocates public policy urging that federal and other public authorities effectively eliminate all vestiges of the housing segregation they and their predecessors have established and perpetuated in communities throughout the nation.

The Lawyers' Committee submits this brief *amicus curiae,* to suggest that this Court accept review of this important case in order to confirm that, in formulating prompt and effective relief for unconstitutional racial segregation in public housing, appropriate, carefully fashioned race-conscious

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[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

site selection remedies satisfy narrow tailoring principles.

STATEMENT OF THE CASE

The factual background of this case is fully recounted in the Petition for a Writ of Certiorari and is not repeated here. Below, however, is a recitation of portions of the procedural history and record relevant to the issues raised in this brief.

1. The Separate Public Housing and Section 8 Programs and the Distinct Constitutional Violations in Each Program

The Dallas Housing Authority operates two separate and distinct federal programs that provide low-income housing. The first is the conventional public housing program, or "housing units owned and operated by DHA." App. at p. 4 n.3.[2] Conventional public housing is comprised of fixed units that are sited, developed, managed and otherwise controlled by DHA. These units are offered to qualifying low-income persons at a rent not exceeding 30% of their income. See 42 U.S.C. § 1437.

The second federal housing program administered by DHA is the Section 8 program, through which DHA subsidizes the rents of eligible low-income participants who reside in participating privately owned housing units through the use of

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[2] References to the decisions below are to the appendix to the Petition for a Writ of Certiorari. The decision of the Fifth Circuit Court of Appeals, *Walker v. City of Mesquite, Tex.*, 169 F.3d 973 (5th Cir. 1999), is contained at pp. 1-35. The decision of the district court, *Walker v. HUD*, No. 3:85-CV-1210-R (N.D. Tex. Oct. 6, 1997), is contained at pp. 66-209.

certificates and vouchers. *See* App. at p. 4 n.3. In order to utilize a voucher or certificate, the participant must find a landlord willing to enter into a lease with the participant and DHA, subject to certain regulatory conditions. *See* App at 141. The Section 8 housing program differs fundamentally from the conventional public housing program in that the number and location of housing units are largely beyond the control of DHA, because the Section 8 program depends entirely upon the availability of privately owned housing and the willingness of its owners to lease to an eligible participant and DHA.

It is undisputed that for decades the defendants in this case committed distinct constitutional violations in both the conventional public housing program and the Section 8 program in Dallas. *See id.* at p. 5. Through its various orders in this case, the district court fashioned relief to remedy those two separate and distinct constitutional violations. *See id.* at 72-85.

Specifically, conventional family public housing was originally sited and built only in minority neighborhoods and, in order to keep such housing and its residents out of non-minority neighborhoods, DHA refused to build any new family public housing in Dallas from 1955 until the construction of 100 units pursuant to the 1987 consent decree in this case. *See id.* at p. 78. As a result of its racially discriminatory siting practices and refusal to develop public housing, as of September 27, 1994, 6,133 of the 6,411 units in DHA's family public housing projects were located in predominantly black or minority concentrated areas. *See id.* at p. 86.

With regard to the Section 8 program, it is undisputed that DHA and the City of Dallas developed and implemented

policies to steer minority Section 8 families to housing in minority areas and to keep them in segregated public housing. *See id.* at pp. 84-85. For example, in the 1970s, DHA allowed only a few tenants to use Section 8 certificates in the suburbs and then completely halted the practice. *See id.* at p. 84. In addition, city inspectors consistently approved units for black families in black neighborhoods that were in serious violation of HUD's housing quality standards. *See id.* at pp. 84-85. As a result, as of September 27, 1994, approximately 60% of the black households in the Section 8 program lived in predominantly black or racially concentrated areas. *See id.* at p. 86.

2. The Race-Neutral Remedies in the Consent Decree and Their Failure to Remedy the Violations

A consent decree addressing the distinct constitutional violations in the public housing program and the Section 8 program was approved by the district court in 1987.[3] The relief provided in that decree for each of the violations was generally race-neutral. *See Walker*, 734 F. Supp. at 1247-62 (N.D. Tex. 1989). Specifically, as to the public housing site selection violation, the decree required, *inter alia*, the demolition of approximately 2600 units of public housing and their replacement on a one-to-one basis with additional public housing units and Section 8 certificates and vouchers. *See id.* Of the replacement public housing units, 100 were required to be sited in non-minority areas. No race-conscious criteria were required with respect to the remaining replacement units. *See*

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[3] The Consent Decree is contained as Appendix A in *Walker v. U.S. Dept. of Housing & Urban Dev.*, 734 F. Supp. 1231, 1247 (N.D. Tex. 1989).

id. App. at 92. As to the violations with respect to the Section 8 program, the decree required the establishment of a Section 8 mobility plan to assist families in finding available private housing. The objectives of the Section 8 mobility program were race-neutral; to facilitate the use of vouchers and certificates in *non-Section 8 impacted* areas of Dallas. *See id.* at 1259-60.

The race-neutral remedies of the consent decree failed to remedy the violations in either the public housing program or the Section 8 program. With regard to public housing site selection, DHA refused to develop public housing units in white areas even after entry of the 1987 consent decree. DHA violated its obligation to develop the 100 units required to be sited in white areas, requiring the district court to order the siting of those units. *See* App. at 81, 92. Moreover, the defendants "continued to propose the development of all additional new public housing units in the predominantly minority West Dallas area." *Id.* at 92. Efforts to site public housing in white areas were met with "strenuous and effective neighborhood and political opposition." *Id.*

With regard to the Section 8 program, the mobility remedy did achieve its race-neutral goal of utilization of 50% of the certificates and vouchers in non-Section 8 impacted census tracts. *See id.* at p. 99. But, as the district court noted, "[t]his accomplishment did not erase the effects of discrimination." *Id.* The race-neutral mobility program largely replaced one set of Section 8 impacted minority census tracts with another set of such tracts. *See id* at p. 99-100. Although some progress toward desegregation was made, the Section 8 program remained predominantly segregated. "While the overall racial concentration of DHA's certificate holders has

improved somewhat, less than 21% of the black families on the program live in predominantly white areas while over 45% of white DHA white [sic] Section 8 families live in such areas." *Id.* at p. 100.

3. The Distinct Race-Conscious Remedies Ordered by the District Court and Their Effectiveness

In light of the failures of the consent decree and the defendants' violations of its terms, the district court vacated the decree, determined the defendants' liability ,and formulated a its own remedial orders that included race-conscious remedies. With regard to public housing, the remedial order affecting DHA required the development of all new public housing units in predominantly white areas until the number of units in white areas equaled the number of units in minority areas. "These units, and any others allocated in the future, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as in minority areas." *See id.* at p. 87. In addition, the remedial order contained provisions to ensure that the public housing units were maintained, and to afford nearby property owners a role in the planning and management of new public housing. *See id.* at p.88.

With regard to the Section 8 program, the remedial order required mobility counseling for African-American families in the Section 8 program to assist them in finding available private housing in predominantly white areas. "The mobility services are to be provided to black DHA participants for the purpose of achieving and maintaining a percentage of

DHA's Section 8 in predominantly white areas." *Id.* at p. 91. Under that program, "[w]hite families do not get the mobility services required under the decree" and "[b]lack Section 8 participants do not get the use of mobility services to help locate housing in minority areas." *Id.*

The white homeowners' challenge was essentially directed at the provisions in the remedial orders requiring the siting of new public housing units in predominately white areas until equal to the number of units in minority areas. In rejecting that challenge, the district court considered alternatives to the race-conscious site selection required in its remedial order and found that none of those alternatives would remedy the violations in the public housing program in this case. As the court noted, allowing or requiring new public housing units in minority or racially integrated areas would only perpetuate the vestiges of prior segregation and the unequal conditions and opportunities afforded white families and black families. *See id.* at pp. 100-01. The district court also considered, and rejected, the alternatives proposed by the defendants and the white homeowners (which included, *inter alia*, non race-conscious site selection methods and conversion of public housing allocation to Section 8 vouchers and certificates) because those plans would not remedy the segregation in the public housing program. *See id.* at pp. 101-11. The district court specifically found that without race-conscious remedial measures, desegregation would not be accomplished. *See id.* at pp. 100-14. As the court explained, any new public housing developed by DHA will be placed in either a white area, minority area, or racially mixed area. *See id.* at p. 106. Because placing such housing in either a minority or racially mixed area would only serve to continue the racial segregation that is at issue, the only option available to remedy the segregation is to require the placement of such housing in a

white area. *See id.* at p. 107.

4. The Court of Appeals' Decision

The only issue presented on appeal was the constitutionality of the race-conscious site selection relief in the district court's remedial order affecting DHA, providing that construction of new public housing units be in predominantly white areas of Dallas. *See* App. at p. 2. The Court of Appeals held the race-conscious site selection criteria unconstitutional and directed the district court to employ only race-neutral site selection criteria to the development of new and replacement public housing. *See id.* at p. 27. In reaching its decision, the court of appeals did not review, analyze, set-aside or disturb the fact findings of the district court that race-neutral site selection criteria had not been, and would not be, effective in remedying the public housing site selection violation. The court of appeals summarily concluded that: "The district court's concern that if it does not attach a race-conscious site selection criterion to new construction, then the new units will end up in minority areas and, as a consequence, Dallas's public housing projects will almost all remain in minority areas, is unfounded." *Id.*

SUMMARY OF ARGUMENT

This Court should review the decision of the court of appeals because decisions regarding segregation in the federal public housing program affect a vast number of families, hundreds of local government authorities, and federal policy. This case represents a rare opportunity to review a judgment on the question of appropriate remedies in this area, and presents a thoroughly developed record.

The test of narrowly tailoring articulated and applied by the court of appeals departs substantially from that established in this Court's jurisprudence. This Court should grant review to correct and provide further guidance to the courts and public authorities regarding the purpose, elements, and application of the narrow tailoring inquiry.

This Court should accept review to resolve a conflict in the courts of appeals regarding the proper consideration of race in remedying, and preventing, discrimination in public housing.

ARGUMENT

1. The Decision of the Court of Appeals Involves a Question of Great National Importance.

The question presented in the Petition for Certiorari is of great national importance. There are 1,238,490 units of public housing in this nation, in 14,814 public housing projects, administered by 1,926 public housing authorities.[4] HUD funds and oversees the operation of this public housing, administered on a local level by housing authorities. Judicial decisions regarding the administration of the nation's public housing program therefore affect an enormous number of families, nearly two thousand local housing authorities, and the policies and actions of the federal government.

This vast public housing program is racially segregated. According to HUD: "African-American public housing

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[4] Goering, Kamely, and Richardson, U.S. Department of Housing and Urban Development, *The Location and Racial Composition of Public Housing in the United States* 12 (1994).

residents typically live in African-American neighborhoods; white public housing residents live in white neighborhoods;" and ". . . African American residents living in family projects are housed in segregated projects in severely poor neighborhoods."[5] This segregation is not fortuitous. Public housing was established pursuant to local and federal policies of *de jure* segregation.[6] *De jure* segregation in public housing largely has been perpetuated through federal and local policies and, to the limited extent that federal and local officials have acted to relieve that segregation, they have been "largely ineffective."[7] HUD leadership in administrations of both political parties have acknowledged the obligation to remedy the conditions and effects of this segregation, and recognized that federal and local housing officials must have available the full range of lawful remedial measures if that objective is to be

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[5] *Id.* at 1, 78.

[6] *See* Discrimination in Federally Assisted Housing Programs, 1986: Hearings Before the Subcomm. on Housing and Community Development of the Comm. on Banking, Finance and Urban Affairs, House of Representatives, 99th Cong. (1986), particularly 16-19 (statement of HUD General Counsel John Knapp) and 15-16 (statement of HUD Secretary Pierce); Achtenberg, Keynote Address, Symposium *Shaping American Communities: Segregation, Housing & the Urban Poor,* 143 U. Pa. L. Rev. 1191, 1193 (1995) ("That the federal government, including HUD, has a long history of having precipitated and perpetuated housing discrimination, there can be no question. At their inception, federal housing programs incorporated many of the prevailing practices of the private housing market and were explicitly discriminatory as a result."); Statement of the President on Federal Policies Relative to Equal Housing Opportunity, 1 FH-FL 5121 (June 11, 1971).

[7] Achtenberg, *supra* note 6 at 1193; *See* 62 Fed. Reg. 1026, 1028 (January 7, 1997); Hearings, *supra,* at 15 - 16 (statement of Knapp).

accomplished.[8] Accordingly, the substantial limitations on the availability of race-conscious remedial measures expressed in the decision of the court of appeals can profoundly affect the capacity of federal and local officials to address longstanding segregation.

As the most recent pronouncement of a court of appeals on the subject, and one that suggests that the applicable law has changed since this Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976), there is a significant risk, in the absence of review by this Court, that HUD and other federal officials will apply nationally the result reached by the court of appeals in this case. So, too, local housing authorities may well conclude that they are without the ability to consider race in any effort to remedy, or to prevent, further racial segregation. It is not unlikely that the decision of the court of appeals will, therefore, affect the obligations of hundreds of local housing authorities and the fate of tens of thousands of families, without further opportunity for review by any court.

This case is an ideal vehicle for this Court's review of the permissible consideration of race to remedy constitutional violations regarding federally assisted housing. Cases challenging racially discriminatory public housing site selection are difficult and expensive because they require an extensive examination of evidence of the decisions and actions taken by federal and local government authorities over decades. Therefore, despite the prevalence of racial segregation in public

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[8] *See* Achtenberg, *supra* note 6; Hearings, *supra* note 6 at 15 - 16 (statement of Pierce); Memorandum from HUD Secretary Pierce Concerning Public Housing Desegregation, 1 FH-FL 5133, 5134 (February 28, 1984). *See also* Statement of the President, *supra*, 1 FH-FL at 5129.

housing nationally, relatively few cases are litigated, and even fewer are brought to a litigated conclusion. Thus, this case presents a rare opportunity to address an issue affecting large numbers of local governing authorities and the housing conditions of tens of thousands of families. Moreover, the extensive record in this case, the parties' attempt to remedy the violations through race-neutral means embodied in the consent decree, and the courts' subsequent assessment of the propriety of race-conscious relief offer a thoroughly developed record on which to decide squarely the question presented.

2. The Decision of the Court of Appeals Substantially Departs from This Court's Precedent Regarding the Obligation of Courts to Afford Victims of a Constitutional Violation Prompt and Effective Relief That Is Narrowly Tailored to Remedy the Violation.

The court of appeals formulated and applied a narrow tailoring analysis that profoundly confuses both the analysis to be undertaken and the factors to be assessed. If left unreviewed, its approach would transform the narrow tailoring inquiry from one designed to ensure that race-conscious relief is reasonably necessary, remedial in nature, and fashioned substantially to address the conditions resulting from the violation, into a flat prohibition on race-conscious relief where *any* race-neutral alternative exists, even if it is clear that the race-neutral alternative will not remedy the violation. The analysis of the court of appeals would constrain courts and public bodies considering race-conscious remedies in a manner that would deny to many victims any effective relief. Such a standard of narrow tailoring defies this Court's admonition that strict scrutiny is *not* "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 202 (1995).

The court of appeals' approach to narrow tailoring

incorporates several fundamental errors. First, the court failed to identify the particular, distinct, unconstitutional conditions to be addressed by the remedial order. This failure caused the court to consider two distinct remedies for two distinct violations in two distinct housing programs as though they were competing alternative remedies for a single violation. Second, the court did not assess the relative effectiveness of race-neutral, as compared to race-conscious, public housing site selection criteria. This failure led the court to enjoin the use of race-conscious site selection criteria, despite undisturbed findings that race-neutral criteria had not, and would not, effectively cure the unconstitutional conditions resulting from racially discriminatory site selection violations. Third, the court failed to distinguish race-conscious from race-neutral relief, leading it to assess one of the distinct race-conscious remedies as though it was a race-neutral alternative to the other distinct race-conscious remedy. This resulted in the court's failure to apply an appropriate narrow tailoring analysis to either of the two remedies ordered by the district court. It also resulted in the court's erroneous conclusion that the distinct remedy it mistakenly perceived to be "race-neutral" should be substituted as a race-neutral alternative for the distinct remedy it did recognize to be race-conscious. Accordingly, this Court should grant certiorari to correct and clarify the formulation and application of the standards of narrow tailoring in fashioning prompt and effective relief for constitutional violations.

The court of appeals' analysis loses sight of the fundamental obligation to fashion prompt and effective relief for constitutional violations. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946). This court in *Louisiana v. United States*, 380 U.S. 145, 154 (1965), stated that where racial discrimination is involved, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the

discriminatory effects of the past as well as bar like discrimination in the future." In *Missouri v. Jenkins*, 515 U.S. 70 (1995), this Court reiterated a three-part framework regarding the exercise of remedial authority. The Court required district courts to consider the following: "[1)] the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . [; 2)] the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'. . . . [; and 3)] federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 88 (quoting *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*)) (emphasis in original); *United States v. Paradise*, 480 U.S. 149 (1987); *see also Shaw v. Hunt*, 517 U.S. 899, 915-916 (1996);. The analysis set forth by the court of appeals fails to follow this long-established precedent in evaluating the relief ordered by a district court.

More specifically, with respect to the first of the court of appeals' fundamental errors, it failed to examine closely the violations to be remedied, the distinct character of the two housing programs affected by the constitutional violations, and the purposes to be served by the two remedies. This failure led it to misperceive the remedial objective as simply "moving black families into white areas" through the Section 8 program, App. at p. 26, ignoring the nearly complete segregation of existing public housing units in minority areas and the need to ensure that further segregation did not result from the siting of new public housing. This formulation of the "narrow tailoring" inquiry is ill-founded because the remedy does not address the nature of the violation, and instead compares apples with oranges with respect to the efficacy of alternatives.

For this reason the court of appeals did not assess the

effectiveness of race-neutral versus race-conscious site selection standards, but compared only race-conscious site selection standards to the mobility program regarding the use of Section 8 certificates and vouchers:

> Based on the relative success of DHA in moving blacks into predominately white areas *via its Section 8 program* between 1994 and 1996, the Walker plaintiffs, HUD, and DHA have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination.

App. at p. 26 (emphasis added). The Section 8 mobility program, however, is a wholly distinct remedy designed to address the separate violation of DHA's discriminatory administration of the Section 8 program. The Section 8 mobility program neither speaks to, nor is capable of affecting, the selection of sites for the ongoing construction of new public housing. Whatever the effectiveness of the Section 8 mobility program, it simply does not answer the question whether race-neutral, as opposed to race-conscious, site selection criteria will effectively remedy the site selection violation with respect to the new public housing that will be constructed.

The court of appeals was largely consumed with the suggestion by the white homeowners that the Section 8 program alone could remedy both the public housing site selection and the Section 8 steering violations. On that question, the court of appeals "neither accept[ed] nor attempt[ed] to reject the factual findings" of the district court that both the Section 8 mobility program and race-conscious site selection for the construction or acquisition of new public housing were necessary to remedy the violations in the two housing programs. App. At p. 24. Instead, focusing solely on the fact that an additional 285 black families had used Section

8 vouchers in white areas in the two-year period between 1994 and 1996, *see* App. at pp. 22-26, the court of appeals reached its conclusion, quoted above, that the district court erred in determining that race-conscious site selection criteria were necessary for new public housing to be constructed in Dallas. To the extent that the court of appeals was attempting to undertake the narrowly tailoring inquiry of the efficacy of alternative remedies, as noted above, it failed to comprehend that the Section 8 mobility program has no effect on the selection of sites for the new public housing that is being developed.

With regard to the second fundamental error, beyond the distractions and incongruities of its analysis of the Section 8 mobility program as an alternative remedy, on the specific question of whether race-conscious site selection criteria were necessary to remedy the public housing violation, the court of appeals not only failed to undertake an analysis of that question, but reached a conclusion contrary to the express findings of the district court that race-conscious site selection criteria were necessary. In less than one paragraph, the court of appeals suggested that site selection criteria based on geography or poverty levels were available and, without any analysis or discussion of the application or effectiveness of those criteria or the district court's findings on the issue, simply concluded that the district court's concern that, absent race-conscious criteria, "the new units will end up in minority areas and, as a consequence, Dallas' public housing will almost all remain in minority areas, is unfounded." App. at p. 26.

Thus, the court made no examination of the effectiveness of race-neutral site selection standards and ignored, but left undisturbed, the careful and appropriate analysis of the relevant factors and record facts bearing on that question through which the district court determined that race-neutral site selection criteria had been and would continue to be ineffective. Yet, the court of appeals determined that race-

conscious site selection criteria were not narrowly tailored because race-neutral criteria were available. *See* App. at p. 27, 28. That race-neutral measures are available, as they will always be, does not answer the question the narrow tailoring inquiry demands – will the race-neutral measures promptly and effectively remedy the violation. Thus, the court of appeals' standard of narrowly tailoring fails the essential test applied to the formulation of any remedy – whether it will effectively cure the violation.

Regarding the third error, the "narrow tailoring" analysis of the court of appeals fails to apply a consistent definition of race-consciousness to remedies it considered as alternatives. Simply stated, the analysis fails to recognize that both the public housing site selection criteria *and* the Section 8 mobility program ordered by the district court are race-conscious. The court of appeals' formulation of the narrow tailoring inquiry is fatally flawed because it considered the Section 8 mobility program to be "a race-neutral measure," App. at p. 26, and therefore assessed it as an "option[] . . . [that] should be explored and tested before adopting a race-conscious remedy as a last resort." *Id.* at p. 27. Because the Section 8 remedy was race-conscious, the court of appeals lacked a basis on which to suggest that it was a race-neutral alternative to race-conscious site selection criteria. This failure to recognize the race-conscious character of the Section 8 remedy therefore undermines the essential basis on which the court rejected race-conscious site selection criteria as an appropriate remedy.

The test of narrowly tailoring constructed by the court of appeals is one that dispenses with the need to identify the precise conditions that offend the Constitution and are to be remedied, abandons any inquiry into whether race-neutral alternatives will be effective in remedying the violation, and foregoes the need to identify relief as race-conscious or to distinguish race-conscious from race-neutral relief. This Court should grant review in this case to provide further guidance in

the purpose of the narrowly tailoring inquiry in assessing appropriate, effective relief and to clarify the factors to be considered in the inquiry and the proper analysis of those factors.

3. The Court of Appeals' Decision in this Case Creates a Conflict Between the Circuits.

The decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other circuits on the propriety and availability of race-conscious site selection criteria as a remedy for the unconstitutionally segregated location of public housing. In *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236-37 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), the Court of Appeals for the Second Circuit explicitly approved an order to build federally funded low-income housing only outside of minority areas as an appropriate remedy for *de jure* segregation in public housing site selection. In that case, the Court found that such an order was "closely tailored" to the constitutional violations to be remedied.[9] In *Gautreaux v. Pierce*, 690 F.2d 616, 622-23 (7th Cir. 1982), the Court of Appeals for the Seventh Circuit affirmed the approval of a consent decree under which HUD was obligated to develop public and assisted housing opportunities in non-minority areas.

In addition, although the appropriateness of utilizing a race-conscious remedy was not squarely before this Court in the *Hills* case, this Court observed that it was "entirely appropriate"

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[9] The Fifth Circuit erroneously characterizes the *Yonkers* decision as an example of race-neutral site selection based only on geographical regions. *See* App. at p. 27. In that case, the Second Circuit recognized that the geographical region designated was identified by reference to its white population, from which subsidized housing had been excluded. *See Yonkers*, 837 F.2d at 1184.

for the Chicago Housing Authority and HUD to be ordered to create housing opportunities in the predominantly white Chicago suburbs as a remedy for the unlawful concentration of most public housing in poor, black neighborhoods. 425 U.S. at 299-301.

The Court of Appeals' decision in this case also conflicts with decisions of other circuits that have held that race may be considered in remedying unconstitutional racial discrimination in housing programs. *See Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982) ("As part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation."); *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970) (holding that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts").

The decision of the Fifth Circuit in this case stands alone in reaching the result that race-conscious site selection criteria may not be utilized in remedying the segregation resulting from purposefully discriminating siting decisions. Accordingly, this Court should grant certiorari in order to resolve the conflict between the Fifth Circuit decision in this case and the decisions of other circuits, and with this Court's decision in the *Gautreaux* case.

CONCLUSION

On basis on the foregoing, *Amicus* respectfully suggest that this court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Daniel F. Kolb, Co-chair
Charles T. Lester, Jr., Co-chair
Norman Redlich, Trustee
Barbara R. Arnwine
Thomas J. Henderson*
Richard T. Seymour
Cheryl L. Ziegler
Lawyers' Committee for
Civil Rights Under Law
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600
Attorneys for Amicus Curiae

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*Counsel of Record